Supreme Court, U. S.
FILED
DEC 7 1976
MICHAEL RODAK, JR., CLERK

No. 76-462

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL PELLICCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
HENRY WALKER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-462

MICHAEL PELLICCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1976. The petition for a writ of certiorari was filed on September 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may utilize 28 U.S.C. 2255 to challenge for the first time the validity of his decision to waive a jury in the middle of trial, and, if he may, whether his challenge has merit.

STATEMENT

After a jury-waived trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conducting an illegal gambling business with five or more persons, in violation of 18 U.S.C. 1955. He was sentenced to five years' imprisonment and fined $20,000, the maximum penalty under the statute. The conviction was affirmed by the court of appeals, *United States* v. *Pellicci*, 504 F. 2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.

Petitioner's trial began before a jury. But after two days of testimony, petitioner's counsel told the court that petitioner wanted to excuse the jury and continue the trial before the court alone. Counsel stated, as his reason for requesting the waiver at that time, that "[i]t is a serious issue. It has to be litigated. It should be litigated" (Pet. 3-4). The court and the prosecution agreed to the waiver, and petitioner signed a written waiver form. The trial judge then personally questioned petitioner to insure that the waiver was being made voluntarily, with the advice of counsel, and without any inducement from the government (Pet. 2-7).

Following affirmance of his conviction on direct appeal, petitioner sought post-conviction review under 28 U.S.C. 2255, arguing for the first time that the waiver was not intelligently made and was prohibited by Rule 23 of the Federal Rules of Criminal Procedure. Both the district court and the court of appeals rejected his arguments (Pet. App. 16-29, 30-33).

ARGUMENT

1. Petitioner's claim for relief should be denied because of his failure to raise it either at trial or on direct appeal. See *Sunal* v. *Large*, 332 U.S. 174. In *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976, this Court ruled that a

defendant whose attorney did not object at trial to his client's being tried in prison clothes could not raise the issue on habeas corpus. As the Court there stated (slip op. 11):

> Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

This rationale is equally applicable here. Petitioner's decision at trial to excuse the jury was made voluntarily, for tactical reasons, and with the advice of counsel. Having made no mention of this issue on appeal, petitioner should not be heard to raise it on collateral attack.

2. In any event, petitioner's arguments challenging the waiver are insubstantial. He contends that the Federal Rules of Criminal Procedure prohibit waiving the jury in the middle of a trial. He offers no precedent to support this argument. The applicable rule of Fed. R. Crim. P. 23(a) provides that:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

As the court below correctly pointed out, "[t]he rule itself contains no hint that waivers during trial are to be treated differently from waivers before trial" (Pet. App. 32).

3. Petitioner argues further that he would not have waived a trial by jury if he had known that his co-defendant's lawyer had told the court at a bench con-

ference that he had "been discussing the possibility of a plea" with his client.[1]

Petitioner's argument is with his lawyer, not with the government or the court.[2] Defendant's counsel knew of the remark and had ample opportunity to mention it to petitioner. Regardless of whether he did, he evidently did not think it significant enough to outweigh whatever tactical advantages he hoped to gain by excusing the jury in mid-trial.[3] "I am frank to disclose the reason why I am anxious to test it," he explained to the court. "It is a serious issue. It has to be litigated. It should be litigated" (Pet. 3-4).

As the court of appeals pointed out, petitioner was carefully advised by the court that he had "an absolute right to continue this trial with that jury sitting here for the last two days and [to] have them arrive at a verdict, either guilty or not guilty as the case may be" (Pet. App. 33). Petitioner also said he had sufficiently discussed the matter with his attorney and, in response to the court's questions, repeatedly stated his unequivocal desire to waive the jury (Pet. 5-6).[4]

---

[1]In response to the court's question whether his client would agree to petitioner's request to excuse the jury, the co-defendant's attorney said, "I have not discussed it with [him]. I have been discussing the possibility of a plea with him. He said he would need possibly the weekend to think it over, and get his financial affairs straightened out" (Pet. 3).

[2]There is no claim here of ineffective assistance of counsel.

[3]Moreover, petitioner executed an intelligent waiver of the jury. There is certainly nothing in the remark itself to make the subsequent waiver invalid *per se*. It was, as the court of appeals said, "relevant but far from crucial to an informed decision to waive jury trial" (Pet. App. 33).

[4]Petitioner contends that the court below improperly denied his request for an evidentiary hearing to determine whether petitioner actually knew of the remark made by his co-defendant's lawyer. But, as the court of appeals correctly decided, an evidentiary hearing on this question would be useless. Since both courts below decided that petitioner was entitled to no relief, whether or not he was aware of the remark to the judge, there would be no purpose in any further inquiry (Pet. App. 33).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

DECEMBER 1976.

DOJ-1976-12